No. [redacted]276

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1924.

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JAUNITA BLUNDELL, OLETA BLUNDELL AND PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

## BRIEF OF COUNSEL FOR APPELLANTS.

BOND, MELTON & MELTON,
*Attorneys for Appellants.*

## INDEX.

EXPLANATION.—The question involved in this case could have been presented under one proposition or assignment of error. We have presented it under three assignments of error rather than under three propositions.


Statement of the Case ..... 1

Statement of Fact ..... 3

Assignments of Error ..... 5

Assignment of Error No. 3..... 6

Argument of Third Assignment ..... 6

Assignment of Error No. 4 ..... 10

Argument of Fourth Assignment ..... 10

Assignment of Error No. 5..... 15

Argument of Fifth Assignment ..... 15

Authorities Under Third Assignment—

Section 23 of the Act of Congress of April 26, 1906 ..... 6, 7

Sec. 8341, R. L. Okla., 1910..... 6, 7

Section 8 of the Act of Congress May 27, 1908 8

Eli Bunch vs. Cole, U. S. Supreme Court, Advanced Opinions, December 15, 1923, page 130 ..... 9

Authorities Under Fourth Assignment—

Southerland Statutory Construction, Vol. 11, 670 ..... 12

Southerland Statutory Construction, Vol. 11, 671 ..... 12

Southerland Statutory Construction, Vol. 11, 672 . . . . . 13
Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 491 14

Authorities Under Fifth Assignment—

Walker vs. Brown, 43 Okla. 144 . . . . . 15
In re Allen's Will, 44 Okla. 392 . . . . . 15
Brock vs. Keifer, 59 Okla. 5 . . . . . 16
Blanset vs. Cardin, 261 Fed. 309 . . . . . 16
Blanset vs. Cardin, 256 U. S. 319, 65 L. Ed. 950 18

No. 788.

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VS.

W. R. WALLACE, APPELLEE.

## STATEMENT OF THE CASE.

The appellants are grandchildren and devisees of Patsy Poff, a Choctaw Indian of the half blood, who devised them a part of her allotment selection and bequeathed the sum of $5.00 to her husband, David H. Poff. The executrix died on the 7th day of August, 1916, in Garvin County, Oklahoma.

The appellee is a grantee of Katherine Bailey, a devisee of said David H. Poff, who devised to said

Katherine Bailey a one-third interest in and to said part of the allotment selection of his wife Patsy Poff. Said executor died in the year of 1918 in Oklahoma County, Oklahoma.

Patsy Poff devised a part of her allotment selection to her grandchildren, contending that Section 23 of the Act of Congress of April 26, 1906, gave her the right to dispose of said part of her allotment selection by will without limitation as to the amount devised and without restriction as to devisees.

David H. Poff devised a one-third interest in and to said land to Katherine Bailey, sole devisee under the will contending that under Section 8341 R. L. Okla. 1910, his wife, Patsy Poff, could not bequeath more than two-thirds of her property away from her husband. That she could not by will preclude him from a one-third interest in and to her estate.

This case was tried in the District Court of Garvin County, Oklahoma, upon an agreed statement of fact. The judgment was for the appellee. An appeal was prosecuted to the Supreme Court of the State of Oklahoma. The judgment of the trial court was affirmed. The case comes to this court on a writ of error from the Supreme Court of the State of Oklahoma.

## STATEMENT OF FACTS.

There can be no controversy as to the facts involved as the case was tried upon an agreed statement of fact. The same is set out below in full.

> "The Northeast quarter of the Northeast quarter of the Southeast quarter of section 12, Township 1, North, Range 4 West, and the West half of the Northeast quarter of the Southwest quarter of lots 6 and 7 and the Southeast quarter of the Southwest quarter of section 6, and the West 19.20 acres of lot one, section 7, Township 1 North, Range 3 West.
>
> "2. That on the 7th day of August, 1916, the said Patsy Poff died testate, and at the time of her death, she was a resident of Garvin County, Oklahoma, and that she was seized and possessed of the lands hereinabove described at the time of her death; that on the 5th day of September, 1916, petition was filed in the County Court by James H. Blundell, seeking to probate an instrument herein propounded as and for the last will and testament of the said Patsy Poff, deceased, that the copy of the will attached to plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will; that on the 18th day of September, 1916, said will was duly admitted to probate as and for the last will and testament of said Patsy Poff, deceased; that the said James H. Blundell was duly appointed executor of said will.
>
> "3. That at the time of the death of the said Patsy Poff, deceased, she left surviving her a husband, whose name was David H. Poff, and that they were married prior to the year 1898, and at the time of the said Patsy Poff, deceased, she and the said David H. Poff were legally husband and

wife; that the sum of $5.00 was bequeathed to David H. Poff under the terms of said will did not amount to one-third of the property of which the said Patsy Poff died seized at the time of her death, but that the estate of the said Patsy Poff amounted to several thousand dollars.

"4. That in the year 1918, the said David H. Poff died a resident of Oklahoma County, Oklahoma; that Katherine Bailey was duly appointed administratrix of his estate with annexed; that the said Katherine Bailey was the sole devisee under said will, and was possessed of all the property owned and held by the said David H. Poff at the time of his death.

"5. That the said Katherine Bailey executed to the plaintiff her warranty deed to the lands described in plaintiff's petition.

"6. That ever since the death of the said Patsy Poff and since the appointment of the said James H. Blundell as executor of said will, the said James H. Blundell as executor has had possession of the lands involved in this action, that Oleta Blundell and Jaunita Blundell are claiming to own said lands by virtue of said will; that the said Patsy Blundell has no interest in said lands, nor does she claim any interest therein; that the only interest claimed by James H. Blundell is by virtue of his having been appointed executor of said estate under the will.

"7. That the said Oleta Blundell and Jaunita Blundell as the owners of said land are now in the possession of the same, and holding the same to the exclusion of the plaintiff; that the said James H. Blundell has been in possession of said lands since the date of the death of the said Patsy Poff as executor of the will of Patsy Poff, deceased, and as guardian of Oleta Blundell and Jaunita Blundell."

## ASSIGNMENTS OF ERROR.

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garvin County, State of Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the District Court of Garvin County, State of Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding that Section 8341 of the Revised Laws of 1910 of the State of Oklahoma was not in conflict with an Act of Congress of the United States of April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

4. The Supreme Court of the State of Oklahoma erred in holding that the will of Patsy Poff, deceased, was invalid and not sufficient in law to divest David H. Poff, the remote grantor of the defendant in error, William R. Wallace, from all right, title and interest in the lands described in said will of the said Patsy Poff, deceased.

5. The Supreme Court of the State of Oklahoma erred in holding that under the Act of Congress of April 26, 1906, the said Patsy Poff, a member of the Choctaw Tribe of Indians could not under the Act of Congress make a will of her lands that by its terms devised all of her real estate to persons other than her husband, David Poff, as provided by Section 8341 of the Revised Laws of 1910, or the State of Oklahoma.

## ARGUMENT AND AUTHORITY.

Briefly and succinctly stated the following is the legal question presented by this appeal:

Under the Federal law can a Choctaw Indian woman of the one-half blood, duly enrolled and recognized as such devise all of her estate, real and personal, save the sum of five dollars, to her grandchildren, regardless of a state statute which provides that a married woman cannot will more than two-thirds of her property away from her husband.

We rely upon assignments of error 3-4 and 5.

ASSIGNMENT OF ERROR No. 3.

**The Supreme Court of the State of Oklahoma, erred in holding that Section 8341 of the Revised Laws of 1910 of the State of Oklahoma, was not in conflict with the Act of Congress of the United States of April 26, 1906, entitled "an act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."**

### Argument and Authority Under Assignment No. 3.

We have but to compare the two acts to note the marked conflict. The Oklahoma statute contains a clear and direct inhibition against the right of a woman while married to bequeath more than two-thirds of her property away from her husband.

The Federal statute confers the right to devise without restriction or limitation save as to age, condition of mind and degree of blood. The testatrix was of lawful age, sound mind and an Indian of the half blood. Therefore she could devise and bequeath all of her estate, real and personal and all interest therein without limitation as to portion of property to be devised and without restriction as to the devisees to be selected.

Congress conferred the right on the Indian to devise without restriction as to devisees with the intent of preventing mercenary intermarriages and for the purpose of protecting the Indians in their property rights.

Section 23 of the Act of April 26, 1906, provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner."

Section 8341, R. L. Okla. 1910, provides:

> "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; provided

> further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

A strong evidence of intent and purpose of the Legislature was the enactment by Congress after the advent of statehood in Oklahoma of Section 8 of the Act of Congress of May 27, 1908, which is as follows:

> "Section 8. That section twenty-three of an act entitled 'An Act to provide for the final dispositions of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of section the words, 'or a Judge of a County Court of the State of Oklahoma.' "

Congress when passing this amendment to Section 23 of the Act of Congress of April 26, 1906, made but one modification thereof, and that was concerning the acknowledgment and approval of wills of a full blood Indian. The fact is very compelling and persuasive that Congress failed to repeal that part of Section 23 conferring the right to will without restriction or limitation and failed to provide that the law of wills of the State of Oklahoma should control. It is significant that Congress provided that in case a full blood Indian should disinherit a parent, wife, spouse or child, Section 23 should be amended by adding at the end of said section the words, "Or Judge of a County Court of the State of Oklahoma," and did not at the same time provide that the law of wills of the State of Oklahoma should apply to all allottees of the Five Civilized Tribes.

The proviso contained in Section 23 of the Act of Congress of April 26, 1906, provides the manner in which the right to disinherit a parent, wife, spouse or child may be exercised by full blood Indians. The proviso in question conferred no right to devise, it simply provided for a procedure to be followed by full bloods who wished to disinherit a parent, a wife, a spouse or children, therefore it cannot be said that Congress granted the full blood the right to disinherit but withheld that right from the half blood. The enacting clause conferred the right regardless of the degree of blood.

Congress has the power to confer the right of disposition by will on Indian Wards without limitation as to portions to be devised and without restriction as to devisees to be selected and such right cannot be limited or impaired by state statutes. Therefore as there is a conflict between the Federal and the state statutes involved the Federal statute is supreme and controls.

The case of *Eli Bunch* v. *J. B. Cole et al.*, is reported in the United States Supreme Court Advanced Opinion for December 15, 1923, at page 130. The first syllabus of said case is as follows:

> "1. Congress may impose restrictions on the right of Indian wards to alien or lease lands allotted to them in the division of the lands of their Tribe which cannot be impaired by state statutes."

In the Cole case, *supra*, Mr. Justice Van Devanter in delivering the opinion of the court used the following language:

"The power of Congress to impose restrictions on the rights of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course is not competent for a state to enact or give effect to a local statute which disregards these restrictions or thwarts their purpose. *Marchie Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 316, 55 L. Ed. 738, 749, 31 Sup. Ct. Rep. 578; *Monson* v. *Simonson*, 231 U. S. 88, 96, 62 L. Ed. 260, 262, 34 Sup. Ct. Rep. 285; *Mullen* v. *Pickens*, 250 U. S. 590, 595, 63 L. Ed. 1158, 1161, 40 Sup. Ct. Rep. 31."

ASSIGNMENT OF ERROR No. 4.

**The Supreme Court of the State of Oklahoma erred in holding that the will of Patsy Poff, deceased, was invalid and not sufficient in law to divest David Poff, the remote grantor of the defendant in error, William R. Wallace from all right, title and interest in the lands described in said will of the said Patsy Poff, deceased.**

**Argument and Authority Under Assignment No. 4.**

The lower court held that the will of Patsy Poff was not sufficient in law for the reason that the Act of Congress of April 26, 1906, was merely in the nature of a removal of restrictions on alienation by will and conferred no right to alienate by will without limitation as to portions devised and without restrictions as to the devisees to be selected.

The court in holding that the authority to dispose of land by will was in the nature of a removal of restrictions against alienation and was not intended to confer an absolute right of disposition by will, without re-

gard to state laws, overlooked and failed to consider the proviso, to-wit:

"Provided that no will of a full blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or child of such full blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner." And the well established rules of statutory construction with reference to provisos.

In passing said Act, Congress was legislating for the Indians, it not only had for its purpose the removal of restrictions, but it also intended to grant the right to dispose of property by will without limitation as to portions of property to be devised or as to the devisees to be selected. Congress said to this testator and to all other Indians of lawful age and sound mind that thereafter as to their lands concerning which Congress had the right to legislate, the same might be devised by will and that as to the form of will the testator was to be governed by the statute of wills in force in the state at the time of the making thereof, but that as to the substance of the will he was to be controlled by the Act of Congress with reference thereto. According to the terms and provisions of said proviso a full blood Indian could disinherit a parent, wife, spouse or children. If it was the purpose and intent of Congress to allow a full blood Indian to disinherit contrary to the laws of the State of Oklahoma, a wife or spouse; then there is a conflict between the

Federal statute and the state statute with reference to the law of wills.

If under the terms of the proviso a full blood Indian could disinherit a wife or spouse against the express provisions of Oklahoma Law, under what Act of Congress was that power and authority conferred? It was conferred by the enacting clause which provides that "every person of lawful age and sound mind, may by last will and testament devise and bequeath all of his estate real and personal and all interest therein." The proviso was simply a restraint or condition placed upon the enacting clause, it restrained full blood Indians from disinheriting except in certain cases. It placed no restrictions whatever upon half bloods of lawful age and sound mind.

In construing the above enacting clause and the proviso thereof, the court failed to consider well established and fundamental laws of statutory construction applicable thereto.

> "Provisos and exceptions are similar, intended to restrain the enacting clause, to except something which would otherwise be within it, or in some manner to modify it."
>
> Southerland Statutory Construction, Volume 11, page 670.

> "A proviso is something ingrafted upon a proceeding enactment, and is legitimately used for the purpose of taking special cases out of a general class to guard against misinterpretation."
>
> Southerland Statutory Construction, Vol. 11, page 671.

The misinterpretation of the Federal Statute involved would have been avoided if the court had con-

sidered that the full blood was simply a special class of Indians taken from the general class granted the power to alienate in the enacting clause.

If it had been the purpose and intent of Congress to simply remove restrictions on alienation by will, why did Congress except the full blood by a special proviso and especially provide how the full blood could disinherit a wife, or spouse?

> "Where there is a prohibition, grant or regulation in general words, and the saving of particular things, there is a strong implication that what is excepted, would have been within the purview, if it had not been excepted, and thus the purview may be made more comprehensive than it would otherwise have been."
>
> Southerland Statutory Construction, Vol. 11, page 672.

A careful consideration of the acts and statutes involved is very convincing. The Federal Act confers the right to devise and bequeath without limitation or restriction save as to the proviso with reference to full bloods.

Congress heretofore in the enactment of laws removing restrictions on Indian Wards and their property usually used language clear and unmistakable in its terms, for example such words as these, "the restrictions on alienations are hereby removed."

If it had been the intention of Congress to merely remove the restrictions on alienation by will, it is very probable that language similar to the following would have been used.

"Restrictions on alienation by will are hereby removed and the local law of wills made applicable" but instead Congress used this language:

> "EVERY PERSON OF LAWFUL AGE AND SOUND MIND MAY BY LAST WILL AND TESTAMENT DEVISE AND BEQUEATH ALL OF HIS ESTATE, REAL AND PERSONAL AND ALL INTEREST THEREIN."

If there is any doubt as to the construction to be placed on the Federal statute involved, that doubt should be resolved in favor of the Indian testatrix.

In the case of *Choate et al.* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 491. The second syllabus reads as follows:

> 2. "Any doubt as to whether the tax exemption provision in the act of June 28, 1898, allotting lands in severalty to the members of the Choctaw and Chickasaw tribes, was a personal privilege and repealable, or an incident attached to the lands itself for a limited period, must be resolved in favor of the patentees."

Mr. Justice LaMar in delivering the opinion of the court in the case of *Choate* v. *Trapp*, *supra*, used the following language:

> 6. "But in the government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

ASSIGNMENT OF ERROR No. 5.

**The Supreme Court of the United States erred in holding that under the Act of Congress April 26, 1906, the said Patsy Poff, a member of the Choctaw Tribe of Indians could not under Act of Congress make a will of her lands that by its terms devised all of her real estate to persons other than her husband, David Poff, as provided by Section 8341 of the Revised Laws of 1910, of the State of Oklahoma.**

**Argument and Authority Under Assignment No. 5.**

The Supreme Court of our state has held that the phrase "prevented by law" as used in the statutes of Oklahoma heretofore set out means, prevented by law, of the state, and does not apply to Indians of the Five Civilized Tribes.

In the case of *Walker* v. *Brown*, 43 Okla. 144, the second syllabus reads as follows:

> 2. *Same.*—Alienation of land—"Prevented By Law." The phrase, "prevented by law," as used in that part of Section 8341, Rev. Laws 1910, which provides "No person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will," means prevented by law of the state, and does not apply to the Indians of the Five Civilized Tribes who are prevented by the Act of Congress from alienating, conveying or incumbering real property while living, otherwise than by last will and testament.

The second syllabus of the case of *In re: Allen's Will*, 44 Okla. page 392, reads as follows:

> 2. *Wills*—Power to Bequeath property—Indians—*"Prevented by Law."* The phrase "Pre-

> vented by law," as used in that part of Section 8341, Rev. laws 1910, which provides, "No person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will," means prevented by law of the State, and does not apply to Indians of the Five Civilized Tribes, who are prevented by Act of Congres from alienating, conveying, or incumbering real property while living, otherwise than by last will and testament.

The syllabus of the case of *Brock* v. *Keifer*, 59 Okla. page 5 may be *obiter dictum*, but it is very apropos and therefore we quote said syllabus:

> "6. The proviso of Section 8341, Rev. Laws 1910, does not apply to wills executed by members of the Five Civilized Tribes of Indians devising their allotted lands."

The case of *Blanset* v. *Cardin et al.*, reported in 261 Fed. 309, is analogous in many respects to the case at bar. The 3rd syllabus of the case reads as follows:

> "3. Under Act of Congress, Feb. 14, 1913, amending Act June 25, 1910, 2 (Comp. St. 4228) allowing persons interested in allotments held under trust or patent containing restrictions on alienation, to dispose of such property by will, and the regulation thereunder, a will by an Indian married woman, approved by the Secretary of the Interior disposing of all of her allotted lands, is valid, notwithstanding Rev. Laws, Okla., 1910, Art. 8341, PROVIDING THAT NO MARRIED WOMAN SHALL BEQUEATH MORE THAN TWO-THIRDS OF HER PROPERTY AWAY FROM HER HUSBAND, and that no person prevented by law from alienating real property shall be allowed to dispose of the same by will."

We quote from the opinion of the court, pages 311 and 312:

> "The grant of the right to dispose of this property by will is clear and comprehensive, IT CONTAINS NO LIMITATIONS AS TO PORTIONS OF PROPERTY TO BE DEVISED NOR TO THE DEVISEES TO BE SELECTED, nor other restraint upon the exercise of the power, except that the disposal must be in accord with the regulations to be prescribed by the Secretary of the Interior and that the will must be approved by him * * *.
>
> "* * * The general policy of Congress has been to maintain control over the Indians and the disposition of their allotments, according to its ideas of what is beneficial for them, rather than submit them to state laws. CONGRESS WAS WELL ADVISED THAT UNWORTHY AND DESIGNING PERSONS SOMETIMES CONTRACT MARRIAGES WITH INDIANS WITH A VIEW TO OBTAINING THE BENEFIT OF THEIR PROPERTY WHICH THE UNITED STATES HAS GRANTED TO THE INDIANS AND THAT THE RIGHT OF A TESTATOR OR TESTATRIX TO SELECT DEVISEES, AND THE RIGHT OF THE INTERIOR DEPARTMENT TO DISALLOW ANY WILL, WOULD OFTEN AFFORD NEEDED PROTECTION TO DEFENDANT AND NATURAL HEIRS AGAINST THE WASTE OF THE ESTATE AS THE RESULT OF UNFORTUNATE MARRIAGE AND ENFORCED INHERITANCE BY STATE LAWS."

We quote further from the opinion of the court on page 313:

> "4. It is conceded that Congress has the right to pass legislation in the interest of the Indians as a dependent people, and that it may control the disposition of the allotments during the period of restriction on alienation *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Heckman* v. *United States*, 224 U. S. 413, 32 Sup. Ct. 242, 56 L. Ed. 820. The conclusion is that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the state as to the portions to be conveyed or as to the object of the testator's bounty provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior. We understand this conclusion is in accord with the views of the Supreme Court of Oklahoma, see *Brock* v. *Keifer*, 157 Pac. 88."

The case of *Blanset* v. *Cardin*, *supra*, was appealed to the Supreme Court of the United States and is reported in 256 U. S. 319 and in 65 L. Ed. 950, the syllabus is as follows:

> "The prohibition of the Oklahoma Code, Section 8341, against the bequest of a married man or woman of more than two-thirds of his or her property away from the other spouse, cannot be invoked to defeat the will of an Indian married woman, the allottee of restricted lands, who died before the expiration of the trust or restrictive period, by which she devised to her children and grandchildren such lands and all trust funds held by the United States to her use and benefit, in view of the provisions of the Act of February 14, 1913,

> Section 2, that one having an interest in any allotment held under trust, or any other patent containing restrictions or alienation, shall have the right, prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent, or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior, who may approve or disapprove the will, either before or after the death of the testator, and that neither circumstances shall operate to terminate the trust or restrictive period, but the Secretary of the Interior may in his discretion, cause a patent in fee to be issued to the devisee or devisees."

Mr. Justice McKenna delivered the opinion of the court. We quote from his language on page 953 of the L. Ed. of the Supreme Court Reports:

> The case is not in broad compass, and presents as its ultimate question the accordance or discordance of the laws of Congress and the laws of the state; and whether there is accordance or discordance depends upon a comparison of Section 8341 of the Oklahoma Code, upon which appellant replies and the Acts of Congress referred to in the bill, and what was done under them.
>
> That comparison we proceed to make. By Section 8341 of the Code, "Every estate and interest in real and personal property which to heirs, husband, widow or next of kin might succeed, may be disposed of by will; Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath (323) more than two-thirds of her property away from her husband; * * *"

The provision of the Code is determinative, appellant contends, because the law of "descent and distribution" of Arkansas was made applicable to the Indian Territory May 2, 1890 (26 Stat. at L. 94, 95 chap. 182), and extended its application in 1904 (April 28, 1904, 33 Stat. at L. 573, chap. 1824); and while at those times "testamentary power had not been given to restricted allottees (the property in this case was a restricted allotment, and the period of restriction had not expired) of any tribe, but property descended as to all tribes, wherever located, according to the local law," yet when Oklahoma was admitted as a state, the Arkansas Law was superseded by the Oklahoma Code. For this *Jefferson* v. *Fink*, 247 U. S. 288, 62 L. Ed. 1117, 38 Sup. Ct. Rep. 516, is adduced.

But against the contention and conclusion the Act of Congress approved February 14, 1913 (37 Stat. at L. 678, chap. 55, Comp. Stat. Sec. 4228, 3 Fed. Stat. Anno. 2d Ed. p. 855), is opposed. Section 2 of the act is as follows:

"Sec. 2. That any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patents containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: * * *."

On page 954 the court speaking through Mr. Justice McKenna said:

"And the further contention is that Section 8341 is continued because the Act of Congress does not expressly provide how the land shall be devised,

and because it recognized the state laws of descent are applicable in case the Secretary disapproves the will after the death of the testator.

If the first contention be true, the Act of Congress is reduced to impotence by its contradictions. According to its contention it permits a will, and immediately provides for its defeat at the very instant it is to take effect and can only take effect. Such antithetical purpose cannot be imputed to Congress, and it is repelled by the words of Section 2. They not only permit a will, but define its permissible extent, excluding any limitation or the intrusion of any qualification by state law. They provide that one having an interest "in any allotment held under trust or other patent containing restriction or alienation * * * shall have the right prior to the expiration of the trust restrictive period and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will in accordance with regulations to be prescribed by the Secretary of the Interior. * * *"

And we agree with the Court of Appeals that the Act of Congress was the prompting of prudence to "afford protection to dependent and natural heirs against the waste of the estate as the result of unfortunate marriage, and enforced inheritance by state law. * * *"

On page 955, Mr. Justice McKenna concluded the opinion of the court in the following language:

"Our conclusion is the same as that of the Court of Appeals, 'that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under the Act of Congress, free from restrictions on the part of the State as to the portions to be (327) conveyed,

> or as to the objects of the testator's bounty; provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.' The court added that the conclusion was in accord with the views of the Supreme Court of the state, referring to *Brock* v. *Keifer*, 59 Okla. 5, 157 Pac. 88."

In the case of *Blanset* v. *Cardin, supra.* It may be said that the testatrix was a restricted allottee of the Quapaw Tribe; that her will was subject to the approval of the Secretary of the Interior; that the Act under which she devised her estate was not applicable to the Five Civilized Tribes, but a comparison discloses the fact that the Act in the Blanset-Cardin case and the act in the case at bar are analogous in this essential respect. That both confer the right to devise without limitation as to portions of property to be devised and without restrictions as to the devisees to be selected.

State sovereignty is jealous of the inherent power of Congress to legislate for Indian Wards. The judgment in the case at bar justifies this conclusion. The prohibition of a state statute against the bequest by a married woman, of more than two-thirds of her property away from her husband, has been invoked to defeat the will of a Choctaw woman who devised her restricted homestead allotment and ten acres of her unrestricted surplus allotment to her grandchildren under a provision of the Federal law.

If Section 8341 of the Code of Oklahoma is a limitation on Section 23 of the Act of Congress of April 26, 1906, the policy of the Government to protect natural

heirs against the results of unfortunate mercenary marriages and enforced inheritance is deterred and defeated and the power of Congress to pass legislation for the protection of a dependent people is ignored and destroyed by a state law.

We earnestly contend that the judgment of the Supreme Court of Oklahoma should be reversed by this honorable court.

Respectfully submitted,

REFORD BOND,
*Attorney for Appellants.*

BOND, MELTON & MELTON,
*Of Counsel.*

No. 7[redacted]278

IN THE

# Supreme Court of the United States

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JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JUANITA BLUNDELL, OLETA BLUNDELL, PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

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## REPLY BRIEF OF APPELLANTS.

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REFORD BOND,
*Attorney for Appellants.*

BOND, MELTON & MELTON,
*Of Counsel for Appellants.*

No. 788.

IN THE

# Supreme Court of the United States

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JUANITA BLUNDELL, OLETA BLUNDELL, PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

## ARGUMENT AND AUTHORITIES.

The first authority cited in the brief of the appellee is the case of *Hill* v. *Buckholts*, 75 Okla. 196; 183 Pac. 42. Said case is not in the same category with the case at bar. The parties to the suit are not of Indian blood, the lands devised are not Indian allotments and therefore the questions raised in said case are entirely different from the issues involved in this action.

The next authority cited by counsel for appellee is the case of *George* v. *Robb*, 64 S. W. 615. Said case is not parallel with the case at bar for the reason that

the cause of action accrued in 1901, five years prior to the passage of the Act of Congress of April 26, 1906, which provides that:

> "Every person of lawful age and sound mind, may by last will and testament, devise and bequeath all of his estate, real and personal, and all interests therein."

And for the further reason that said cause of action arose more than eight or nine years before Section 8341 of the Oklahoma Code was adopted which provides:

> "Nor shall any woman while married bequeath more than two-thirds of her property away from her husband."

Said case is not in point for the further reason that the parties to the suit are citizens of the Creek Nation and not members of the Choctaw Tribe of Indians. In 1901 the Choctaws were without authority to execute wills under the laws of Arkansas then in force in the Indian Territory.

> "Prior to March 4, 1904, the Chickasaw Indians had the right to dispose of their devisable property by wills made in accordance with the laws of the Chickasaws, the proper Chickasaw Probate Court had jurisdiction to probate these wills, and its judgments are impervious to collateral attack."
>
> (*Hayes* v. *Barringer*, 168 Fed. page 221.)

> "Act of Congress June 28, 1898, c. 517, 30 Stat. 504, 28, divested the tribal courts in the Indian Territory of all jurisdiction in all cases, abolished the courts and conferred their jurisdiction on the United States courts, but Section 29

(page 505) declared that such should only be the case if the Atoka Agreement which was part of the act should not be ratified, the act should then only apply to the Choctaw and Chickasaw tribes, where it did not conflict with the provisions of the agreement. The agreement was ratified within the time prescribed, and it declared that the United States courts in Indian Territory should have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession or use of real estate and all persons charged with certain crimes committed in the Indian Territory. *Held*, that the agreement repealed so much of the Act of June 28, 1898, as attempted to withdraw probate jurisdiction from the tribal courts of such nations and vest it in the territorial courts, and that prior to the Act of Congress, April 28, 1904, c. 1824, 33 Stat. 573, which took from the Indian courts all jurisdiction and conferred it on the United States courts, the latter courts had no jurisdiction to appoint a guardian for a Chickasaw minor."

(*In re Poff Guardianship*, 103 S. W. page 765.)

By the Act of May 2, 1890, there was put in force in the Indian Territory, Chapter 155 of Mansfield's Digest of the Statutes of Arkansas, entitled "Wills and Testaments." There was a hiatus, however, between the Act of May 2, 1890, and the Act of April 28, 1904, in which the laws of Arkansas on "Wills and Testaments," did not embrace persons of Choctaw and Chickasaw blood. By Section 2 of the Act of April 28, 1904, complete jurisdiction was conferred upon the district courts in the Indian Territory in the settlement of estates of decedents and guardianships of minors and incompetents.

whether Indians, freedmen or otherwise. After the passage of the Act of April 28, 1904, members of the Choctaw tribe of Indians could devise their alienable property under Mansfield's Digest of the Statutes of Arkansas.

Counsel for the appellee cite many cases that are not analogous to the case at bar for the reason that the cause of action in each instance arose when the Statutes of Arkansas, on "Wills and Testaments," were in force in the Indian Territory.

The case of *In re Brown's Estate*, 97 Pac. 613, 22 Okla. 216, is not in point with the case at bar. The court did not in said case construe the Act of Congress involved in this action and did not consider or discuss the Oklahoma Law of Wills involved herein. Said decision is based upon a provision of the Supplemental Creek Agreement and the laws of Arkansas governing wills, and neither said provision of the Creek Agreement, nor the laws of Arkansas governing wills are analogous to the Act of Congress involved in this case, or the laws of Oklahoma governing wills. The cause of action arose prior to the passage of the Act of April 26, 1906.

The case of *Taylor* v. *Parker*, 126 Pac. page 573, 33 Okla. page 199, 59 Law Edition 12, is not parallel to the case at bar. In said case the court held that the restrictions upon alienation by an Indian Allottee extended to a devisee by will and that the extension of the Arkansas laws to the Indian Territory enabled an Indian in said territory to devise all his alienable property by will in accordance with the laws of the State of Arkansas, but did not operate to remove restrictions on alienation

of an Indian allottee. The court in rendering the opinion in said case did not consider the Federal Act in question conferring power and authority on allottees to alienate by will, and did not consider the Statutes of Oklahoma with reference to the disinheritance of a parent, wife, spouse or child.

The case of *Jefferson* v. *Fink*, reported in 247 U. S. page 288, is not analogous in any way to the case at bar. Said case does not involve a construction of the Federal statute conferring power and authority on allottees to alienate their allotments by will; it does not involve a construction of the law of wills as set forth in the Statutes of Oklahoma; it does not involve the question as to whether or not said Federal Statute conflicts with said state statute, but simply holds that the Oklahoma law of descent is applicable to Indian allotments. The applicability of such law, however, is not disputed, there being no Federal law in conflict with same.

There is a marked distinction between the law of wills as set forth in Mansfield's Digest of the laws of Arkansas, and the law of wills as set forth in the Compiled Statutes of Oklahoma.

Section 6500 of Mansfield's Digest provides:

> "When any person shall make his last will and testament and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, such person so far as regards such children shall be deemed to have died intestate and such children shall be entitled to such proportion, share and dividend of the estate, real and personal of the testator as if he had died intestate, and such children

> shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares."

Section 8341 of the Oklahoma Law provides:

> "Every estate and interest in real or personal property to which heirs, husband, widow or next of kin might succeed, may be disposed of by will, provided that no marriage contract in writing has been entered into between the parties, nor shall a man while married bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband, provided, further that no person who is prevented by law from alienating, conveying or incumbrancing real property while living shall be allowed to bequeath same by will."

The restriction of the Arkansas Statutes relates to the form of the will, "If the testator fails to mention the name of a child, he shall be deemed to have died intestate and such child shall be entitled to a proportionate share of the estate." This provision is not a hard and fast limitation or restriction. It can be avoided by the testator simply mentioning the name of the child, in other words, if a testator desires to disinherit a child, the will could be so drawn by counsel as to comply with the law, and the wishes of the testator. The restriction set forth in the Oklahoma law relates to the substance of the will and is an express limitation on the power of the testator to devise. It provides that no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath

more than two-thirds of her property away from her husband. This provision is binding upon the husband and wife alike, it cannot be avoided by either of them, it cannot be defeated by the form of the will. Counsel for the testator could not draw a will so as to escape the terms and provisions of the statute. This brief but succinct statement sets forth the clear distinction between the Arkansas and Oklahoma statutory restrictions with reference to wills.

Counsel for appellee at the outset of their argument assert:

> "It is contended by the appellee that by virtue of the provisions of the Enabling Act said section above quoted, applies to the will of a half blood Choctaw Indian who died since statehood."

The section referred to by counsel is that provision of the Oklahoma Code which provides:

> "Nor shall any married woman while married bequeath more than two-thirds of her property away from her husband."

The reservations of the Enabling Act refutes such a contention, Section 1 of said Act prohibits the State of Oklahoma from placing anything in its constitution that shall be construed TO LIMIT OR IMPAIR THE RIGHTS OF PERSONS OR PROPERTY PERTAINING TO THE INDIANS OF SAID TERRITORY OR LIMIT OR AFFECT THE AUTHORITY OF THE UNITED STATES GOVERNMENT TO MAKE ANY LAWS or regulations, respecting the

Indians, their lands, property or otherwise. Said section reads as follows:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

Section 8341 of the Oklahoma Code was enacted by the Oklahoma Legislature after the passage of the Enabling Act, and after the advent of statehood.

Counsel for the appellee contend that the provision of the Oklahoma code, which provides:

> "Nor shall any married woman, while married bequeath more than two-thirds of her property away from her husband."

is determinative for the following reasons, that the Act of Congress of May 2, 1890, extended in force in the Indian Territory, Chapter 55, of Mansfields' Digest, on wills and testaments, and that Section 2 of the Act of April 28, 1904, made all of the laws of Arkansas theretofore put in force in the Indian Territory, applicable to

Indians and their property, WERE NOT INCONSISTENT WITH THE ACTS OF CONGRESS GOVERNING THE SAME, and that Congress provided in the Enabling Act, Section 13, that the laws in force in the territory of Oklahoma, SO FAR AS APPLICABLE, shall extend over and apply to said state until changed by the legislature thereof, and that when Oklahoma was admitted as a state, the Arkansas law was superseded by the Oklahoma code, but, against this contention and conclusion of counsel for appellee, the Act of Congress of April 26, 1906, is opposed. It is in conflict with said provision of the Oklahoma Code, said provision of the Oklahoma Code is inconsistent with said act and is inapplicable.

Section 23 of said act provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; Provided: That no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

In our original brief we presented the argument and authorities upon which appellant relies for a reversal of this cause. In our reply brief we have simply answered and replied to the argument presented for counsel for appellee, and have distinguished the authorities presented by them from the case at bar.

In conclusion we re-assert that Section 8341 of the Oklahoma Code cannot be invoked to defeat the will of a Choctaw Indian woman who devised a part of her allotment selection under the terms and provisions of Section 23 of the Act of April 26, 1906.

Respectfully submitted,

REFORD BOND,
*Attorney for Appellant.*

BOND, MELTON & MELTON,
*Of Counsel for Appellant.*